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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

LOUIE L. WAINWRIGHT,
Secretary, Department of
Offender Rehabilitation,
State of Florida,

Petitioner,

vs.

JAMES ROBERT SCOTT, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED

(1) WHETHER THE DOCTRINE ANNOUNCED IN *Faretta v. California*, 422 U.S. 806 (1975), SETTING FORTH A FEDERAL CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION SHOULD BE APPLIED RETROACTIVELY TO CASES FINALIZED

BY TRIAL AND DIRECT APPEAL PRIOR TO THE DATE OF THAT DECISION.

(2) WHETHER THE DENIAL OF SELF-REPRESENTATION CAN BE SUBJECT TO A HARMLESS ERROR RULE.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i-ii
OPINIONS BELOW	1
JURISDICTION	2-3
STATEMENT OF THE CASE	3-6
REASONS FOR GRANTING WRIT	7-24
CONCLUSION	25
CERTIFICATE OF SERVICE	26
APPENDIX:	
Opinion of the United States Court of Appeals, Fifth Circuit, Scott v. Wainwright, 617 F.2d 99 (5th Cir. 1980)	A 1
Denial of Petition for Rehearing and/or Petition for Rehearing en banc	A 16
Opinion of the United States District Court, Middle District of Florida, Ocala Division, Scott v. Wainwright, 475 F.Supp 170 (1979)	A 18

Opinion of the District Court of Appeal of Florida, Second District, Scott v. State, 345 So.2d 414 (Fla. 2nd DCA 1977) A 49

Opinion of the District Court of Appeal of Florida, Second District, Scott v. State, 308 So.2d 213 (Fla. 2nd DCA 1975) A 59

TABLE OF CITATIONS

	Page
CASES	
Bittaker v. Enomoto, 587 F.2d 400 (1978)	18
Board of Commissioners v. Dexterhouse, 348 So.2d 916 (Fla. 2nd DCA 1977)	12-13
Bromley v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977), *cert. den.* 435 U.S. 908	12
Chapman v. California, 386 U.S. 18 (1967)	23
Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562 (1975)	Passim
Gideon v. Wainwright, 372 U.S. 335 (1963)	24
Harrington v. California, 395 U.S. 250 (1969)	23
Laird v. Tatum, 409 U.S. 824 (1972)	10
MacKenna v. Ellis, 263 F.2d 35 (1959)	8,16
Marquez v. Bittaker, 441 U.S. 913 (1979)	18

Martin v. Board of County Commissioners, 364 So.2d 449 (Fla. 1978), *appeal dism.* 441 U.S. 918 — 13

Martin v. Wyrick, 568 F.2d 583 (8th Cir. 1978), *cert. den.* 435 U.S. 975 — 8,17

Owsley v. Peyton, 352 F.2d 804 (4th Cir. 1965) — 12

People v. McDaniel, 16 Cal. 3d 156, 127 Cal. Rptr. 467, 545 P.2d 843 — 9

Scott v. Florida, 434 U.S. 853 (1977) — 5

Scott v. State, 308 So.2d 213 (Fla. 2nd DCA 1975) (A 59) — 1,4

Scott v. State, 345 So.2d 414 (Fla. 2nd DCA 1977) (A 49) — 1,5,9

Scott v. Wainwright, 475 F.Supp 170 (1979), at 178-179 (A 45-48) — 1,6

Scott v. Wainwright, 617 F.2d 99 (5th Cir. 1980) at 104 (A 14) — 1,6

State v. Dwyer, 332 So.2d 333 (Fla. 1976) — 12

Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) — 13

United States ex rel. Lawrence v. Woods, 402 F.2d 1072 (7th Cir. 1970), *cert. den.* 402 U.S. 983 — 12

RULES

28 U.S.C. §1254(1) — 2

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported at 617 F.2d 99 and appears in the Appendix hereto as A 1-15. The opinion of the United States District Court, Middle District of Florida, Ocala Division, is reported at 475 F.Supp 170 and is included in the Appendix hereto as A 18-48.

The opinion of the state appellate court affirming the denial of post-conviction relief is reported at 345 So.2d 414 (Fla. 2nd DCA 1977) and is included at A 49-58.

The opinion of the state appellate court affirming Scott's conviction on direct appeal is reported at 308 So.2d 213 (Fla. 2nd DCA 1975) and is included at A 59.

JURISDICTION

The United States Court of Appeals, Fifth Circuit, entered its decision on May 14, 1980. A timely filed Petition for Rehearing and/or Petition for Rehearing en banc was denied on June 18, 1980 (A 16-17) and this petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained

> by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Respondent James Robert Scott was tried and convicted in Florida in April of 1974 of the offenses of false imprisonment and kidnapping and of robbery. Prior to his trial Scott requested that he be allowed to represent himself. The state trial court denied Scott's request and he was tried utilizing the services of the appointed public defender. Following adjudication, the Public Defender raised on direct appeal the issue of self-representation and

Scott himself filed several documents pro se. The state appellate court affirmed respondent's conviction in an unwritten per curiam opinion on February 12, 1975. *Scott v. State*, 308 So.2d 213 (Fla. 2nd DCA 1975) (A 59). One hundred and thirty-eight days later this Honorable Court decided the case of *Faretta v. California*, 422 U.S. 806, 45 L.Ed.2d 562 (1975), wherein it was held that the Sixth and Fourteenth Amendments permit an accused to represent himself at trial and that it violates the Constitution when the state forces an individual to accept the services of counsel.

Thereafter, respondent Scott filed a motion for post-conviction relief in the state court claiming

entitlement to the benefit of the *Faretta* ruling. The State trial court denied the motion and on appeal that denial was affirmed. It was held that *Faretta* is not to be given retroactive application. *Scott v. State*, 345 So.2d 414 (Fla. 2nd DCA 1977) (A 49-58). This Honorable Court denied Scott's application for certiorari review, *Scott v. Florida*, 434 U.S. 853.

Scott sought federal habeas corpus review and on April 20, 1979, the Honorable Charles Scott, United States District Judge, denied relief. Judge Scott adopted the report and recommendation of Magistrate Schlesinger and held that respondent Scott's constitutional rights were not violated by the state trial

court. The court rejected Scott's contentions that the law of the Fifth Circuit afforded him a constitutional right of self-representation and that the *Faretta* decision should be applied retroactively. *Scott v. Wainwright*, 475 F.Supp 170, at 178-179 (A 45-48).

On Appeal, the Fifth Circuit reversed. Ostensibly declining to reach the question of whether *Faretta* was retroactive, that court held Scott was entitled to habeas corpus relief because the law of the Fifth Circuit allegedly had recognized the right of self-representation even prior to *Faretta*. *Scott v. Wainwright*, 617 F.2d 99 at 104 (5th Cir. 1980) (A 14).

REASONS FOR GRANTING THE WRIT

(1) THE DECISION OF THE LOWER COURT CONFLICTS WITH DECISIONS OF ANOTHER FEDERAL COURT OF APPEALS AND OF THE STATE APELLATE COURTS ON THE CONSTANTLY RECURRING QUESTION OF WHETHER *Faretta v. California*, 422 U.S. 806 (1975) SHOULD BE APPLIED RETROACTIVELY.

The lower court declared that it was unnecessary to decide the question of retroactivity of *Faretta* because the law of the Circuit granted the right of self-representation long before this Honorable Court decided *Faretta* (A 14). While ostensibly declining to reach the retroactivity question but actually affording retro-

active effect by reliance on dicta in a 1959 Fifth Circuit decision (*MacKenna v. Ellis*, 263 F.2d 35), the lower court decision creates conflict with the decision of the Eighth Circuit Court of Appeals in *Martin v. Wyrick*, 568 F.2d 583 (8th Cir. 1978), *cert. den.* 435 U.S. 975.

In *Martin v. Wyrick, supra*, a state prisoner sought federal habeas relief contending that his constitutional right to self-representation had been denied. The *Faretta* decision was announced seven days prior to the affirmance of his conviction by the state appellate court. Rejecting the petitioner's claim, the Eighth Circuit held:

> "Given the foregoing analysis, we agree with the California Supreme Court that the *Faretta*

> rule should be applied only prospectively in those cases wherein the accused sought to assert the right of self-representation in a trial commenced after June 30, 1975, the date the *Faretta* decision was filed."
>
> (568 F.2d at 588)

Similarly, the appellate court in Florida had ruled that *Faretta* should not be applied retroactively. *Scott v. State*, 345 So.2d 414, at 41 (Fla. 2nd DCA 1977) (A 57), *cert. den.* 434 U.S. 853. *Accord, People v. McDaniel*, 16 Cal.3d 156, 127 Cal.Rptr. 467, 545 P.2d 843.

Today, whether the federal constitutional right of self-representation applies to pre-1975 trials depends on *geography*. State prisoners who assert such a constitutional right obtain no redress if unfortunate

enough to have committed their crimes in North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri or Arkansas (states encompassed within the Eighth Circuit) but are awarded federal habeas relief if incarcerated in Florida, Georgia, Alabama, Mississippi, Texas or Louisiana (states over whom the Fifth Circuit sits). It is intolerable in a federal system that constitutional rights be predicated on location; as indicated by Mr. Justice Rehnquist in his memorandum opinion in *Laird v. Tatum*, 409 U.S. 824 (1972), it is undesirable to have "one rule in Athens, and another rule in Rome". 409 U.S. at 838.

All concerned, the states and their respective prisoners, as well

as the lower federal courts, should be authoritatively informed whether or not the landmark decision in *Faretta* is to be applied retroactively to cases finalized prior to June 30, 1975.

(2) THE DECISION OF THE LOWER COURT STRAINS THE CONCEPTS OF COMITY AND FEDERALISM BY REQUIRING THE STATE COURTS TO BE BOUND BY LOWER FEDERAL COURT DECISIONS WHICH ARE CONTRARY TO THE STATE COURT'S INTERPRETATION OF THE CONSTITUTION.

The lower court decision enormously strains the concepts of comity and federalism by requiring the state courts to abandon their own considered decisions interpreting the United

States Constitution, to abdicate their judicial functions and to rubber stamp the dicta and holdings of the federal appellate courts in whose circuits they sit. Other federal appellate decisions have recognized that state courts are not compelled to accept lower federal court interpretations of the law and may rely on their own until guided by a binding decision by this Honorable Court. *Owsley v. Peyton*, 352 F.2d 804 (4th Cir. 1965); *United States ex rel. Lawrence v. Woods*, 402 F.2d 1072 (7th Cir. 1970), *cert. den.* 402 U.S. 983; *Bromley v. Crisp*, 561 F.2d 1351, at 1354 (10th Cir. 1977), *cert. den.* 435 U.S. 908. *Accord, State v. Dwyer*, 332 So.2d 333 (Fla. 1976); *Board of Commissioners v. Dexterhouse*, 348 So.2d 916 (Fla. 2nd

DCA 1977), *affirmed Martin v. Board of County Commissioners*, 364 So.2d 449 (Fla. 1978), *appeal dismissed* 441 U.S. 918.

In *Stone v. Powell*, 428 U.S. 465 (1976), this Court declared that it was:

> ". . . unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law."
>
> (428 U.S. at 493, footnote 35)

While *Stone* dealt with the ability of state courts to protect Fourth Amendment rights, it is equally true that state courts are as competent, conscientious and learned

as their federal counterpart in considering other constitutional rights. Confirmation of this fact can be found in the excellent analysis by District Judge Scott and Magistrate Schlesinger who agreed with the state court that self-representation should not be applied retroactively (A 18-48). The lower court's decision disdainfully rejects this presumption and announces the rule that failure by the state courts to perceive and obey earlier federal appellate dicta (in cases to which Florida was not a party) constitutes error of constitutional magnitude. Thus, the state judiciary is robbed of any dignity as an independent arbiter sworn to apply the law faithfully; instead, state courts are relegated to the status of mere

automatons mechanically repeating previous federal court language. If our unique federal system is to continue to have vitality, the instant decision should be reviewed to correct the lower court's misapprehension that only the federal circuit, not the state courts, can responsibly interpret the United States Constitution.

The lower court decision not only fails to accord any respect to the state courts' co-equal right to interpret the Constitution, but also minimizes this Court's historic role in ultimately deciding what is the law of the land. The Fifth Circuit pretends not to decide an important federal question. Instead of applying its understanding of the requirements of the landmark *Faretta* deci-

sion, the lower court has concluded that *Faretta* is not a major decision since the "circuit" right of self-representation allegedly has existed for over two decades (beginning with the dicta contained in *MacKenna v. Ellis, supra*). Perhaps the lower court hopes that its facile conclusion involving the supremacy of circuit law will avoid this Honorable Court's serious review of a significant constitutional question. Petitioner trusts that expectation is ill-advised for the ineluctable logic of the Fifth Circuit decision is that even if this Court ultimately decides *Faretta* to be only prospectively applicable, federal habeas relief can be available to state prisoners based on the law of the

Circuit, not the Constitution!

(3) THE DECISION OF THE LOWER COURT ERRONEOUSLY DECIDED AN IMPORTANT FEDERAL QUESTION AFFECTING THE ADMINISTRATION OF CRIMINAL JUSTICE.

The lower court's statement that it need not decide the question of *Faretta*-retroactivity because pre-*Faretta* decisions in the Circuit had established a constitutional right of self-representation begs the question. For if the Eighth Circuit Court decision in *Martin v. Wyrick, supra,* is correct that *Faretta* applies only prospectively (and only this Honorable Court can resolve the question) then it matters not what the law of the Fifth Circuit has

been. While the lower court joins the Ninth Circuit (*Bittaker v. Enomoto*, 587 F.2d 400, *cert. den. sub nom Marquez v. Bittaker*, 441 U.S. 913) in the verbal minuet of affording but not declaring retroactive import to *Faretta*, petitioner and the other states within the Fifth Circuit must silently await the expected deluge in federal district courts of state prisoners asserting self-representation denial claims. Certainly in some cases the trial records may contain documentation of such pre-trial desire but in most cases no such positive evidence will be found. In either event, federal district courts will be required to hold hearings on cases long since finalized.

Moreover, a decision holding the right to self-representation to be retroactive might not be limited to those prisoners who clearly asserted their right prior to trial. Certainly, some will maintain they did not know of their self-representation rights and had they known would have rejected the assistance of counsel in favor of self-representation. One cannot waive an unknown right. To accept this view in effect would unlock the jails to all prisoners tried prior to 1975.

Eventually, in this case or by some future petition, this Honorable Court will have to decide whether pre-1975 trials are included within the self-representation mandate.

If the court declines to accept this case but ultimately decides adversely to the decision of the Fifth Circuit, Florida will have suffered irreparable injury by the lower court's erroneous ruling resulting in the release of lawfully-confined prisoners (as will the other states in the Circuit).

The Court must, therefore, resolve the retroactivity question now.

(4) IF THE SELF-REPRESENTATION RIGHT IS GIVEN RETROACTIVE APPLICATION, THE FAILURE TO AFFORD THE RIGHT SHOULD BE SUBJECT TO HARMLESS ERROR ANALYSIS.

Mr. Justice Blackmun in dissenting to the *Faretta* decision and joined by the Chief Justice and Mr.

Justice Rehnquist, observed that one of many unanswered questions posed by the decision was:

> "May a violation of the right to self-representation ever be harmless error?"
>
> (422 U.S. at 852)

The majority opinion itself appears to recognize that, unlike the requirement of providing the assistance of counsel, permitting self-representation is not designed as a means of furthering the truth-determining process:

> "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. See Powell v. Alabama, 287 US 45, 77 L Ed 158, 53 S Ct

55, 84 ALR 527; Johnson v. Zerbst, 304 US 458, 82 L Ed 1461, 58 S Ct 1019, 146 ALR 357; Gideon v. Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733; Argersinger v. Hamlin, 407 US 25, 32 L Ed 2d 530, 92 S Ct 2006. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant."

(422 U.S. at 832, 833)

* * * * *

"It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be

> realized if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that *in some rare instances*, the defendant might in fact present his case more effectively by conducting his own defense."
>
> (422 U.S. at 834 - emphasis supplied)

The lower court simply applied a mechanical rule that the harmless error doctrine was inapplicable (A 14). Constitutional error may be harmless. *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U. S. 250 (1969). Obviously, it could not be seriously maintained that harm resulted were a criminal defendant acquitted after being represented by counsel forced upon him. Petitioner would submit

that an accused charged with murder could not persuasively contend the harmless error doctrine to be inapplicable if a verdict were returned on a lesser verdict of assault or battery. Petitioner maintains that in light of the significance attached to the importance of effective assistance of counsel since the landmark case of *Gideon v. Wainwright*, 372 U.S. 335 (1963) and since respondent has never attacked the quality of the representation of counsel at his trial by way of an ineffective counsel claim, the harmless error doctrine should be deemed applicable if *Faretta* is given retroactive effect.

CONCLUSION

For the foregoing reasons petitioner submits that the decison of the lower court should be reviewed by this Honorable Court; the petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, Counsel for Petitioner, and a member of the Bar of the Supreme Court of The United States, hereby certify that on the _____ day of 1980, I served three copies of the Petition for Writ of Certiorari on Richard A. Belz, Esquire, Counsel for Petitioner, Florida Institutional Legal Services, Inc., 2614 S.W. 34th Street, Gainesville, Florida 32608, by a duly addressed envelope with postage prepaid.

ROBERT J. LANDRY
Assistant Attorney General

A P P E N D I X

James Robert SCOTT, Jr.,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
Respondent-Appellee.

No. 79-2067.

United States Court of Appeals,
Fifth Circuit.

May 14, 1980.

State prisoner sought federal habeas corpus relief. The United States District Court for the Middle District of Florida, Charles R. Scott, Senior District Judge, 475 F.Supp. 170, denied his petition, and appeal was taken. The Court of Appeals, Simpson, Circuit Judge, held that the law of the Fifth Circuit even before Supreme Court decision in *Faretta v. California* was that a criminal defendant had a constitutional right to defend pro se and that the right is only conditioned upon a knowing and intelligent waiver of the corresponding constitutional right to be represented by counsel.

Reversed and remanded.

Criminal Law 641.4(1)
Law of Fifth Circuit even before Supreme Court decision in *Faretta v.*

California was that criminal defendant had constitutional right to defend pro se and that the right is only conditioned upon knowing and intelligent waiver of corresponding constitutional right to be represented by counsel. U.S.C.A.Const. Amends. 6, 14.

Richard A. Belz, Florida Institutional Legal Services, Inc., Gainesville, Fla., for petitioner-appellant.

William I. Munsey, Jr., Asst. Atty. Gen., Tampa, Florida., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before SIMPSON, CHARLES CLARK and FRANK M. JOHNSON, Jr., Circuit Judges.

SIMPSON, Circuit Judge:

In this habeas case petitioner Scott argues that the Florida court erroneously denied him his constitutional right to self representation in his criminal trial. The district court denied habeas relief and held that the Fifth Circuit did not recognize an absolute constitutional right to self representation prior to the Supreme Court's decision in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and that *Faretta*

is not retroactive. The law in this circuit at the time of Scott's trial accorded criminal defendants the constitutional right to self representation. We reverse, and remand.

On the afternoon of December 27, 1973 a lone gunman robbed the Yalaha, Florida post office and abducted the elderly postmistress. Petitioner Scott was tried and convicted of these crimes in a Florida court. Prior to trial Scott filed a motion to dismiss his appointed public defender and defend pro se. Even though the trial judge found Scott sui juris and mentally competent, he denied the motion because Scott lacked legal education and because of the complexity of the case. Scott was represented by a public defender during the trial.

On appeal the conviction was affirmed per curiam. *Scott v. State*, 308 So.2d 213 (Fla.App.1975). Several months later the Supreme Court held, in *Faretta, supra*, that a criminal defendant has a Sixth Amendment right to represent himself if he knowingly and intelligently elects to do so and that a defendant need not have the skill or experience of a lawyer in order to competently and intelligently choose self representation. Subsequently Scott sought, and was denied post conviction relief in the state trial court. On appeal the Florida appellate court held that *Faretta* is not retroactive and affirmed. *Scott v. State*, 345 So.2d 414

(Fla.App.1977), *cert. denied*, 434 U.S. 853, 98 S.Ct. 168, 54 L.Ed.2d 123.

Undaunted, Scott filed the present habeas petition in the district court alleging that he was being held in violation of the constitution because the state trial court denied his motion to defend pro se. The cause was argued before a United States magistrate. The magistrate filed a lengthy report and recommendation reviewing the pertinent decisional law of this circuit and concluding that prior to *Faretta* this circuit did not accord a criminal defendant an absolute constitutional right to self representation and that *Faretta* is not retroactive. The district court adopted the magistrate's report as its own opinion and denied habeas relief. The present appeal followed.

Faretta decisively held that a criminal defendant has a Sixth Amendment constitutional right to represent himself. The right applies to criminal defendants in state courts through the due process clause of the Fourteenth Amendment. *Id.* 422 U.S. at 819, n. 15, 95 S.Ct. at 2543; *Duncan v. Louisiana*, 391 U.S. 145, 148, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968). Prior to *Faretta* the Supreme Court had not clearly held the right to self representation to be of constitutional status. *Stepp v. Estelle*, 524 F.2d 447, 450 (5th Cir. 1975); *United States v. Dougherty*, 473 F.2d 1113, 1121-23 (D.C. Cir.1972). However there was dictum to that effect

in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942).[1] The *Adams* dictum spawned a line of Fifth Circuit cases which lead us to conclude that at the time of petitioner's criminal trial he had a constitutional right to represent himself which was erroneously denied him.

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1 *Stepp v. Estelle, supra*, 524 F.2d at 450. The dictum in *Adams* follows:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law . . . .
>
> . . . What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.
>
> . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Id. 317 U.S. at 279-280, 63 S.Ct. at 241-42.

The seminal Fifth Circuit case is *MacKenna v. Ellis*, 263 F.2d 35 (5th Cir. 1959), *cert. denied*, 360 U.S. 935, 79 S.Ct. 1453, 3 L.Ed.2d 1546 [hereinafter referred to as *MacKenna I*]. MacKenna sought habeas relief from a state court conviction because the trial court had allegedly denied him due process by refusing to let him represent himself and, instead, forced him to go to trial represented by inexperienced and incompetent counsel. This court stated:

> The defendant, being sui juris and mentally competent, had a right to rely on his own skill and ability and to conduct his defense in person with out the assistance of counsel; and the court was not justified in imposing assigned counsel on the defendant against his will. Clearly, we think, it would be a denial of due process of law for the court to refuse to permit the accused, sui juris and mentally competent to defend himself and, instead, require him to accept the services of inexperienced and incompetent counsel. ..

Id. at 41. We think the quoted language clearly states that the right to self representation is of constitutional dimension. Furthermore the cases cited in support of the first sentence of the quote so hold. See, *Adams v. United States ex rel. McCann, supra*, 317 U.S. at 279, 63 S.Ct. at 241-42, 87 L.Ed. at 274-75; *United States v. Private Brands*, 250 F.2d 554, 557 (2d Cir. 1957); *Simpson v. State*, 141 Tex.Cr.R. 324, 148 S.W.2d

852, 853 (1941). Subsequent decisions of this court reinforce our interpretation.

MacKenna's cause came before this court a second time [*MacKenna II*] after the district court denied habeas following remand in *MacKenna I*. *MacKenna v. Ellis*, 280 F.2d 502 (5th Cir. 1960) *modified*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). *MacKenna II* dwelt mainly on the issue of effective assistance of counsel. Nevertheless, the court once again stated that although a trial judge may appoint counsel over the protest of a criminal defendant when he lacks the intelligence or education to conduct his own defense, a defendant who is sui juris and mentally competent has "a right to rely on his own skill and ability and to conduct his defense in person without the assistance of counsel."[2]

---

2 *Id.* at 599, *quoting*, *MacKenna I*, *supra*, 263 F.2d at 40-41. We discern no meaning ful distinction between the "sui juris and mentally competent" requirements of *MacKenna I* and *MacKenna II* and the Supreme Court's declaration in *Faretta* that the right to self representation must be preceded by a knowing and intelligent waiver of the corresponding right to counsel. See, *Faretta*, *supra*, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 581. Obvicusly a defendant must be sui juris and

The magistrate's report interprets *MacKenna I* and *MacKenna II* to merely hold that a criminal defendant is denied due process if he is forced to accept inexperienced or incompetent counsel. The two *MacKenna* decisions do stand for that proposition, but the decisions also hold that a criminal defendant has a constitutional right to self representation. Our conclusion is supported by decisions post-*MacKenna*.

In *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965), this court stated in dictum that the right to defend pro se is a constitutionally protected right.[3] There is other language in *Juelich*, also in dictum, which suggests that appointment of counsel may be mandatory on due process grounds "when the circumstances of a defendant or the difficulties involved in presenting a particular matter are such that a fair and meaningful hearing

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competent before he can make such a waiver. However, neither *Faretta* nor *MacKenna* requires a criminal defendant to have the knowledge and experience of a lawyer before he can conduct his own defense.

3 The discussion of the Sixth Amendment right to counsel in *Juelich* is dictum because the case involved denial of the right during habeas proceedings. The Sixth Amendment does not apply in that circumstance. *Id.* at 31-32. However, a habeas petitioner does have a statutory right to self representation. 28 U.S.C. § 1654.

cannot be had without the aid of counsel." *Id.* at 32, *quoting, Dillon v. United States*, 307 F.2d 445 (9th Cir. 1962). The first condition, "the circumstances of a defendant" is merely a less precise way of stating that a defendant must be sui juris and mentally competent before he can knowingly and intelligently waive his right to counsel. See, *Faretta, supra*, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 581; *MacKenna I, supra*, 263 F.2d at 41. The second condition, "the difficulties involved in presenting a particular matter," is more troublesome. Nevertheless we reject any implication in *Juelich* that the right of self representation may be denied simply because of the complexity of the case.[4] Further,

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4 See *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975) wherein this court acknowledged a line of cases in other jurisdictions which hold that the right may be denied in certain circumstances. *Id.* at 277, n. 4.

The state court gave the complexity of the case as a reason for denying Scott's motion to defend pro se. The record reveals that the case involved rather simple fact questions only. If a trial court could deny the constitutional right in the instant fact situation, then the right could be denied on case complexity grounds in the majority of criminal trials. A constitutional right cannot rest on such tenuous grounds.

the dictum in *Juelich* cannot be interpreted to require the accused to have the experience and training of a lawyer without emasculating the constitutional right to self representation. The right to defend pro se extended to non-lawyers before *Faretta*.

A glimmer of light was shed on the issue by *Middlebrooks v. United States*, 457 F.2d 657 (5th Cir. 1972), *cert. denied*, 409 U.S. 848, 93 S.Ct. 55, 34 L.Ed.2d 90. There the defendant unsuccessfully represented himself in the district court against charges of mail fraud. He sought and was denied post conviction relief on the ground that his waiver of the right to counsel was not knowing and intelligent. This court affirmed, stating that the decision to defend pro se was "a reasonable exercise of . . [the defendant's] freedom of choice." *Id.* at 659. The court flatly rejected the defendant's argument that the mere rejection of the right to counsel established the lack of mental competence to make a knowing and intelligent waiver of right to counsel. *Id.* at 659-60.

The pre-*Faretta* cases discussed above established that the law in this circuit even before *Faretta* was that a criminal defendant has a constitutional right to defend pro se and that the right is only conditioned upon a knowing and intelligent waiver of the corresponding constitutional right to be represented by counsel. Any doubt

or confusion as to our pre-*Faretta* law was dispelled by three of our post-*Faretta* decisions. All three involved the right to self representation in criminal trials occurring before *Faretta* was decided by the Supreme Court.

United States v. Garcia, supra, note 4, was decided several weeks after *Faretta*. The issue was whether a criminal defendant could waive the right to conflict-free assistance of counsel. This court concluded that if a defendant can altogether waive the right to representation of counsel then he can waive the right to conflict-free counsel. *Id.* at 277. It is significant that *MacKenna* and *Faretta* were cited side by side for the proposition that a defendant can dispense with the right to be represented by counsel. *Garcia, supra,* 517 F.2d at 277. We there expressed awareness of a line of cases holding that the right to self representation may be denied in certain circumstances, but no Fifth Circuit cases were cited as a part of that line. *Id.* at n. 4. The most logical inference to be drawn is that the *Garcia* court concluded that *MacKenna I* and *Faretta* stand for and define the same constitutional right.

Stepp v. Estelle, 524 F.2d 447 (5th Cir. 1975) was decided six months after *Faretta*. There the defendant argued that he was not mentally competent at his state court trial and that therefore

the state had committed constitutional error by allowing him to defend pro se. This court held that the district court's determination of lack of mental capacity to waive counsel was clearly erroneous. *Id.* at 449. The opinion makes four points which are relevant to the instant case. First, although the Supreme Court had not previously held that the pro se right is of constitutional status, there was dictum to that effect in *Adams, supra,* 317 U.S. at 279-80, 63 S.Ct. at 241-42, 87 L.Ed. at 274-75. *Stepp v. Estelle, supra,* 524 F.2d at 450. Second, in the thirty years following *Adams,* the majority of the circuits recognized the pro se right as a constitutional right derived from the Sixth Amendment. *Id.* at 451. Third, this circuit's opinions in *Juelich, supra,* and *Middlebrooks, supra,* were cited as holding that a criminal defendant has a Sixth Amendment right to proceed pro se. Finally, the opinion applied the principles laid down in *Faretta,* but did not specifically discuss whether *Faretta* is retroactive.

Chapman v. United States, 553 F.2d 886 (5th Cir. 1977), was decided two years after *Faretta.* A federal trial court denied Chapman's request to defend pro se and convicted him of attempted escape from a federal penitentiary. In the appeal from denial of habeas relief the government argued that *Faretta* is not retroactive and that the denial of the right to defend was, at most, violation of a statutory right. 28

U.S.C. § 1654, and therefore harmless error. We held that the question of retroactivity was not presented under the *Chapman* facts because the issue arises only when the Supreme Court announces a new rule and because the rule in the Fifth Circuit at the time of Chapman's trial was that a criminal defendant has a constitutional right to represent himself. *MacKenna I*, *Juelich*, and *Middlebrooks* were cited in support of this proposition. The court held on alternate grounds, and perhaps unnecessarily, that "even had we not explicitly characterized the right to defend pro se a Sixth Amendment right prior to *Faretta*, the constitutional basis of that right should be retroactively applied at least where the right was independently guaranteed by § 1654." *Id.* at 890.

The magistrate's report and recommendation in this case, adopted as the opinion of the district court, goes to great lengths in attempting to explain why the "dictum" in *Chapman* is an erroneous interpretation of *MacKenna* and its progeny. First, Chapman's discussion of the constitutional derivation of the self representation right was not dictum. One issue was whether the harmless error rule applied. If the right was of constitutional dimension then the rule did not apply, but if the rule was only a statutory right then the harmless error rule would apply. *Chapman*, *supra*, 553 F.2d at 891, n.9. Therefore, it was necessary to the decision of the case to determine the source of

the pro se right. Secondly, we feel constrained to point out that once *Chapman* outlined the parameters of pre-*Faretta* Fifth Circuit law, the principle of stare decisis required the district court (and this panel) to follow that law.

Appellee's argument that the harmless error rule should be applied is meritless. *Chapman* holds that the harmless error doctrine does not apply to denials of the right to self representation. Id. at 891, n. 9.

As an alternate ground for granting the pro se right constitutional stature *Chapman* concluded that *Faretta* is retroactive at least in the federal court setting where it is independently guaranteed by 28 U.S.C. § 1654. *Id.* at 890. The instant case involves denial of the right in a state court, and 28 U.S.C. § 1654 is hence not applicable. We need not reach the question of retroactivity of *Faretta* in this setting because the law of this circuit granted the right long before the Supreme Court decided *Faretta*.

Petitioner Scott is entitled to habeas relief because of the denial of his constitutional right of self representation in his state court trial.

Upon remand, the district court should allow the State of Florida a reasonable time within which to re-try Scott before making the issuance of the

writ final.

REVERSED and REMANDED.

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

June 18, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-2067 - James Robert Scott, Jr.
-vs- Louie L. Wainwright

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and state of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By /s/ H.E. Adams, Jr.
Deputy Clerk

CC: Mr. Richard A. Belz
Hon. Jim Smith
Mr. William I. Munsey, Jr.

James Robert SCOTT, Jr., Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida, Respondent.

No. 78-4-Civ-Oc.

United States District Court,
M. D. Florida,
Ocala Division.

Magistrate's Opinion Feb. 22, 1979.

Judge Scott's Order April 20, 1979.

Proceeding was instituted on petition of state prisoner for federal habeas corpus. The District Court, Charles R. Scott, Senior District Judge, adopted opinion of United States Magistrate, Harvey E. Schlesinger, J., and held that: (1) law of Fifth Circuit at time in question did not afford state prisoner a constitutional right of self-representation, but only afforded state prisoner a constitutional right to waive assistance of counsel, and (2) decision in *Faretta*, establishing constitutional right to self-representation subsequent to time in question, was not retroactive in application.

Petition denied.

1. Criminal Law 641.4(1)

Law of Fifth Circuit at time in question did not afford state prisoner a constitutional right of self-representation, but only right to waive assistance of counsel. U.S.C.A. Const. Amends. 5,6.

2. Courts 100(1)

Decision in *Faretta*, establishing constitutional right to self-representation subsequent to time in question, was not retroactive in application. U.S.C.A. Const. Amends. 5,6.

Richard A. Belz, Florida Legal Services, Inc., Prison Project, Gainesville, Fla., for petitioner.

William I. Munsey, Jr., Asst. Atty. Gen., Tampa, Fla., for respondent.

OPINION

CHARLES R. SCOTT, Senior District Judge.

This is a habeas corpus case in which petitioner, James Robert Scott, Jr., contends that the trial court's refusal to allow him to defend pro se was error of constitutional magnitude. The case was referred to the Honorable Harvey E. Schlesinger, United States Magistrate, for findings of fact and conclusions of law. After an evidentiary hearing was held,

the Magistrate issued his report on February 22, 1979, recommending that the petition be denied and the case dismissed.

Petitioner has challenged the Magistrate's conclusions of law on two grounds. First, he contends that the law of the Fifth Circuit at the time of his trial afforded him a constitutional right of self-representation. Secondly, in the alternative, petitioner argues that, even if the law of the Fifth Circuit did not so provide, the Supreme Court's decision in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which established the constitutional right to self-representation, should be applied retroactively. These arguments are the same as those made before the Magistrate.

The Court has thoroughly reviewed the record and weighed the arguments of both parties. The issues raised by petitioner present difficult and far-reaching problems regarding the administration of justice to those who sought to represent themselves before state courts. In his report and recommendation, the Magistrate analyzed in detail the decisions relied upon by both parties, and the Court is convinced that the analysis is correct.

Although pursuant to 28 U.S.C. § 636(b)(1)(C), the Court must make a *de novo* determination of those portions of the Magistrate's report and recommendation to which objections have been

filed, the Court feels it can add little to the reasoning employed by the Magistrate in resolving these difficult questions. Consequently, the Magistrate's report and recommendation is adopted as the opinion of the Court, and, accordingly, the petition for writ of habeas corpus will be denied and the case dismissed.

REPORT AND RECOMMENDATION

HARVEY E. SCHLESINGER, United States Magistrate.

FACTS

Petitioner, JAMES ROBERT SCOTT, JR., was convicted in state court for the offenses of false imprisonment and kidnapping and robbery on April 9, 1974. Appeal of the conviction was taken to the Second District Court of Appeal of Florida where on February 12, 1975, the Petitioner's conviction was affirmed. Post-conviction relief was also denied by the trial court on July 26, 1975. An appeal of this order was also affirmed by the Second District Court of Appeal of Florida. A petition for a writ of certiorari to the Supreme Court of the United States was filed and subsequently denied. Thereafter, this petition for writ of habeas corpus was filed.

Prior to Petitioner's original trial, he filed a *pro se* Motion to Dismiss the public defender and represent himself. A hearing was held, and

the trial judge entered an order denying the defendant's request. The Petitioner then proceeded to trial utilizing the services of his appointed public defender. Upon conviction, Petitioner filed several documents *pro se*, including notice of appeal, assignment of errors, brief of appellant, and a motion for non-appointment of counsel. Although Petitioner's direct appeal was handled by the office of the public defender, the issue of self-representation was raised and preserved. The issue before this Court is whether the trial court's denial of Petitioner's demand to defend *pro se* was a deprivation of a constitutional right.

CONCLUSIONS OF LAW

I. MacKENNA AND ITS PROGENY

The first argument to be considered is whether the law of the Fifth Circuit at the time of Petitioner's original trial provided for a constitutional right to absolute self-representation. It is argued that *MacKenna v. Ellis*, 263 F.2d 35 (5th Cir. 1959), and its progeny established the rule that a defendant who is *sui juris* and mentally competent has an absolute right to defend *pro se*; absolute, meaning not forcing the defendant to have assistance of counsel.

In the original *MacKenna* case, the Petitioner sought relief from conviction through a petition for writ of habeas corpus in federal court. One of the

bases alleged was that MacKenna had been denied due process of law when the trial court required him to accept incompetent counsel rather than allow him to represent himself. In discussing this point, the court pronounced the oft-quoted statement that:

> . . . [t]he defendant, being sui juris and mentally competent, had a right to rely on his own skill and ability to conduct his defense in person without the assistance of counsel; and the court was not justified in imposing assigned counsel on the defendant against his will. *Id* . at 41.

This was grounded on the Supreme Court case of *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942). That case involved a defendant in a federal mail fraud case who not only represented himself, but waived his right to a jury trial. The Court of Appeals had concluded that a defendant in a federal criminal case could not effectively waive his right to a jury trial without the assistance of counsel in making that decision. The court stated at page 275, 63 S.Ct. at page 240:

> The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may

> he competently and intelligently waive his Constitutional right to assistance of counsel.

The court went on to state at page 277, 63 S.Ct. at page 241:

> The question in each case is whether the accused was competent to exercise an intelligent, informed judgment--and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

In a further discourse on what rights a criminal defendant had in a federal case, the court continued at page 279, 63 S.Ct. at page 241 by stating:

> The right to assistance of counsel and correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. *But the Constitution does not force a lawyer upon a defendant*. He may waive his constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. *Johnson v. Zerbst*, 304 U.S. 458, 468-69, 58 S.Ct. 1019, 1024, 1025, 82 L.Ed. 1461. [Emphasis added.]

The court concluded that if a person can waive his right to counsel he may also, without the advice of counsel, waive his right to a jury trial.

The *MacKenna* court, *supra*, continued, clarifying the purpose and extent of the rule quoted above saying:

> Clearly, we think, it would be a *denial of due process* of law for the court to refuse to permit the accused, sui juris and mentally competent, to defend himself and, instead, *require him to accept the services of inexperienced and incompetent counsel, as is alleged in the petition for habeas corpus. The appellant is entitled to a hearing to ascertain the truth or falsity of such allegations. Id.* at 41. [Emphasis added.].

The allegations made were that his "forced" attorneys were of no assistance at all. The Court of Appeals remanded the case to the District Court for the purpose of giving MacKenna an opportunity to prove his allegations.

After the District Court had ruled on remand, the case was again before the Court of Appeals. *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960). That opinion makes even more clear the holding of the first *MacKenna* case. After making the initial determination that Texas law preserved the question, the court stated the issue to be "whether, in the unusual circumstances of this case, the trial judge offended due process in appointing counsel, over the protest of the accused." In resolving the issue, the court first noted

that the right to counsel means the right to *effective counsel* which included the undivided loyalty of the attorney. The record of the hearing held upon remand indicated that the attorneys appointed by the trial court had less than six months experience between them. They had handled but one case previously. Further, at the time of their appointment each of the young lawyers was awaiting openings in the district attorney's office. The court reasoned that due to this inexperience and conflict of interest, it was not surprising that the attorneys were willing to accomodate the district attorney to the possible detriment of petitioner. In holding that MacKenna had been denied a fair trial, the court said:

> A trial judge who appoints fledgeling attorneys as defense counsel, over the defendant's protest, cannot wash his hands of their mistakes.

The court further stated:

> As we see it, an essential element of the fair trial of a defendant with court-appointed counsel is trial court sensitivity to protecting the defendant against obvious mistakes of young, inexperienced, appointed counsel. A genuflection in the direction of justice by the pro forma appointment of counsel such as MacKenna

> had is something less than adequate judicial guidance in the *furnishing of effective counsel to an accused.* [Emphasis added.] *Id.* at 601.

The *MacKenna* case, as the undersigned reads it by itself, stands only for the proposition that a defendant is denied due process if he is forced to accept the services of inexperienced or incompetent counsel. The primary issue was ineffective assistance of counsel, not the right to self-representation.

The problem posed is thus: if the Court does not read *MacKenna* to mean that a *sui juris*, mentally competent defendant in state court has a constitutional right to absolute self-representation, how could the state trial judge in this case be held to so interpret that case? As will be seen later, it took the Fifth Circuit until 1977 to state that *MacKenna* actually meant that the absolute right to self-representation is grounded in the Sixth Amendment right to counsel rather than under the due process provisions. By only gazing into a crystal ball could this be seen prior to that time. Such is not required of courts. As stated by the Supreme Court in *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) at page 156, 89 S.Ct. at page 941:

> It would have taken extraordinary clairvoyance for anyone to perceive that this language meant

> what the Supreme Court of Alabama was destined to find that it meant more than four years later; and, with First Amendment rights hanging in the balance, we hesitate long before assuming that either the members of the Commission or the petition possessed any such clairvoyance at the time of the [trial] . . ..

By looking at those subsequent cases citing *MacKenna* is the issue of an absolute constitutional right to self-representation in a state criminal trial presented? I feel that until after the completion of petitioner's trial, it was not.

In *Lee v. Alabama*, 406 F.2d 466 (5th Cir. 1969), *cert. denied*, 395 U.S. 927, 89 S.Ct. 1787, 23 L.Ed.2d 246, for instance, the issue was whether there was evidence supporting the petitioner's claim that there had been a conspiracy in the trial court to try petitioner although he was insane. The question of the petitioner's self-representation dealt with that right only in regard to the habeas corpus proceedings. The issue was raised apparently to show only that petitioner's waiver of counsel in the collateral proceedings was not affected by his claimed incompetence at trial. The court said:

> [W]e think it clear, under the circumstances, that in this habeas corpus proceeding Lee has not been

> unconstitutionally denied the assistance of counsel either in the district court or on appeal. *Id.* at 469.

Although reference was made to *MacKenna*, the court explicitly recognized that the petitioner's *pro se* right was grounded on statutory authorization, viz. 28 U.S.C. § 1654, and used *MacKenna* only to support its conclusion that in a *federal habeas* case neither the trial court, nor the court of appeals could force counsel on an individual who wishes to represent himself. This conclusion was reached by referring to *Adams, supra,* and *Juelich v. United States*, 342 F.2d 29 (5th Cir. 1965).

> An element of this statutory right [28 U.S.C. § 1654] was at issue in *Juelich*. There petitioner had attempted to represent himself in a § 2255 action. The district court's denial of petitioner's motion to dismiss appointed counsel was raised on appeal. As in *Lee*, the court did not decide whether a defendant in state court is constitutionally entitled to absolute self-representation. Although citing *MacKenna* for the view that in a criminal prosecution the right to defend *pro se* is constitutionally protected, the court said:
>
> > [t]hat question need not be decided in this case, for while the Sixth Amendment right to counsel extends through direct appeal of the judgment or conviction, a

> movant under 28 U.S.C. § 2255, has passed beyond the stage of an "accused" in "defense" of "a criminal prosecution", and the Sixth Amendment does not apply. *Id.* at 31-32.

Moreover, the court went on to say that there could be instances where allowing a defendant to defend *pro se* would be a *denial* of due process under the Fifth Amendment. The court also found that any error in denying Juelich his statutory right [28 U.S.C. § 1654] would not warrant reversal since counsel had been able, diligent, and faithful. If *MacKenna* created an absolute right to self-representation, why then did the court refer to the harmless error doctrine which is not applicable to constitutional violations? Perhaps, the answer is that *Juelich* was a habeas case and not a direct criminal appeal. Support for this case can be found in *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977) at 891 n. 9, which will be discussed later. Again, then, the Court in *Juelich* was not dealing specifically with the state criminal defendant's absolute right to defend *pro se*.

MacKenna was also cited in *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). The issue there was whether two defendants in a federal criminal trial could waive the right to have their retained counsel free from conflicts of interest. The court rejected the government's suggestion that it is

impossible to waive the right to counsel saying:

> If defendants may dispense with the right to be represented by counsel altogether, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *MacKenna v. Ellis*, 263 F.2d 35 (5th Cir. 1959), it would seem that they may waive the right to have their counsel free from conflicts of interest. *Id.* at 277.

Thus, the holding of the case concerned the waiver of conflict-free counsel. *MacKenna* could be cited here only for the view that in certain situations counsel could be waived, while the cite to *Faretta* was for any absolute right to self-representation that existed. As in *Lee* and *Juelich*, the holding did not deal specifically with the constitutional right of a state criminal defendant to represent himself.

Garcia was decided subsequent to Petitioner's trial and in reality was another federal criminal case relating to effective waiver of counsel, not the forcing of an attorney on a defendant who wished to represent himself. This reasoning is inescapable because that court concluded by stating at page 278:

> We hold only that if, as a matter of fact, a defendant after thorough consultation with the trial judge [in federal cases?]

> knowingly, intelligently and voluntarily wishes to waive this protection [effective and competent assistance of counsel], the Constitution does not prevent him from so doing.

Garcia was decided on August 8, 1975, approximately one month after the Supreme Court decided *Faretta, supra.* The reason for this historical comment reveals itself in footnote 4 found on page 277 of *Garcia.* The court in reaching its conclusion that a defendant may dispense with representation of counsel "altogether" stated:

> In reaching this conclusion, we are cognizant of a line of cases indicating that the right to dispense with counsel at trial is not absolute but may be denied in appropriate circumstances. E. g., *Manson v. Pitchess*, 317 F.Supp. 816 (C.D. Cal. 1970); *Seale v. Hoffman*, 306 F.Supp. 330 (N.D. Ill. 1969); *United States v. Davis*, 260 F.Supp. 1009 (E.D. Tenn. 1966). While we offer no judgment as to the cogency of these decisions, we find their rationales inapplicable to the facts of this case. Moreover, the recent decisions [sic] in *Faretta v. California, supra*, seems to seriously erode the holdings of these cases. In the instant litigation, the defendants are seeking not to proceed pro se but rather to retain the same counsel

> who represented them in state criminal and federal grand jury proceedings. Furthermore, there is no clear indication that a knowing and intelligent waiver of the right to effective counsel in these circumstances would adversely affect the defendants', the prosecutor's, or the public's interest in a fair trial.

If *MacKenna* established an absolute right to self-representation, why then this comment? Obviously, even one month after *Faretta*, the Fifth Circuit was not settled on whether *Faretta* stood for that proposition. Surely, if *MacKenna* meant this, the footnote would have stated that this circuit, since *MacKenna*, has concluded the law to be just the opposite. Rather than offering "no judgment as to the cogency of these decisions" the court would have stated that *MacKenna* conferred an absolute right to self-representation. This statement was made after the Supreme Court in *Faretta* cited *MacKenna* 422 U.S. at page 817, 95 S.Ct. at page 2532 for the proposition that both the Fifth and Sixth Amendments guarantee "the right of the accused personally to manage and conduct his own defense in [criminal cases]."

The Court cannot conclude that the Supreme Court held *MacKenna* covered an absolute right to self-representation in this circuit because *Garcia* is to the contrary. The holding of *Garcia* was

extended to state criminal defendants in *Gray v. Estelle*, 574 F.2d 209 (5th Cir. 1978). There, counsel in the state trial had been retained by petitioner upon the agreement that the attorney's criminal complaint against petitioner in another case would be dropped. Having recognized that a conflict existed, the court remanded with directions for the district court to determine whether a voluntary, knowing, and intelligent waiver had been made. The decision, of course, still meant that the defendants would be represented by counsel, whether conflict-free or otherwise. *MacKenna* was cited only for the proposition that a defendant may dispense with counsel.

Finally, the case of *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977) is likewise not decisive. There, petitioner had been tried in *federal court* for a *federal crime*. Under 28 U.S.C. § 1654, defendants in federal court have the statutory right to self-representation. The question before the court was whether Chapman had asserted that right in a timely manner. However, even though it may be contained in *obiter dictum*, we need to explore *Chapman* to see if it might tell us what the state of the law was in this circuit between *MacKenna* and *Faretta*.

Chapman held that a demand by a state criminal defendant for absolute self-representation must be honored if it is unequivocally asserted in a timely manner. The court stated at page 889:

> Defendants in federal court have long been guaranteed by statute the right to conduct their own defense. 28 U.S.C. § 1654. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which involved a state criminal defendant, made clear that the sixth amendment itself grants to every criminal defendant, state or federal, the personal right to conduct his own defense. *Faretta* held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon a defendant who properly asserts that right.

Thus, for the first time the Fifth Circuit mentions the absolute right to self-representation, or, in other words, whether the Constitution prohibits the forcing of an attorney on a state criminal defendant who wants to represent himself. This statement was based upon the Supreme Court's pronouncement in *Faretta*.

The United States attempted to argue that *Faretta* was not applicable because it could not apply retroactively. They also argued that Chapman's absolute right to self-representation in his federal case was based upon statutory grounds (28 U.S.C. § 1654) rather

than constitutional ones, and, therefore, the harmless error doctrine applied.

The remainder of the court's ruling of interest in this case is the conclusion that the court was not faced with an issue of the retroactivity of *Faretta*. The court stated at page 890:

> The question of retroactivity arises only when the Supreme Court forges a "new rule". Whatever the novelty in some jurisdictions of a constitutional basis for the right to defend pro se, federal courts in general and this court in particular have traditionally found a sixth amendment basis for the right to conduct one's own defense. The Supreme Court early on indicated in dictum that the constitutional right to have the assistance of counsel carries with it a "correlative right to dispense with a lawyer's help." *Adams v. United States ex rel. McCarnn*, 317 U.S. 269, 279, 63 S.Ct. 236, 241, 87 L.Ed. 268 (1942). Relying on this dictum in *MacKenna v. Ellis*, 263 F.2d 35, 40-41 (5th Cir. 1959), this court declared of a state prisoner, whose petition for habeas obviously could not rest on § 1654, that:
>
> > [t]he defendant, being sui juris and mentally competent, had a right to rely on his own skill and ability and to conduct his

> defense in person without the assistance of counsel; and the court was not justified in imposing assigned counsel on the defendant against his will.

If *MacKenna* stands for the proposition that *Chapman* says it does, then the original *MacKenna* case would not have been remanded. If *MacKenna* had an absolute right to self-representation, his petition would have been granted and the *writ of habeas corpus* issued. This must be so because he was represented by court-appointed counsel, over his objections, and yet the Fifth Circuit did not say "your constitutional rights have been violated so we will grant you relief." Instead, they ordered the case remanded to determine whether his attorneys were ineffective and incompetent. That question did not have to be answered if forced counsel, by itself, violated the constitutional rights of a state criminal defendant.

This is supported by *Juelich, supra*, as explained above. Realizing that that decision applied the harmless error doctrine, even though it dealt with a federal case, not a state case, the *Chapman* court stated at page 891 in footnote 9:

> We have, to be sure, said in dictum that the denial of a defendant's pro se right is harmless if the defendant was not prejudiced. *Juelich v. United States, supra*, 342 F.2d at 33. Insofar as

"prejudice" refers to the possibility that the court might have reached a different result, we disapprove this dictum. Having decided that the right to defend oneself is a sixth amendment right, we could in any event give it no effect in the case at bar. The dictum referred solely to a situation in which the pro se right no longer rested on a constitutional basis. That is, although *Juelich* acknowledged that a criminal defendant has a sixth amendment pro se right at trial, that opinion was concerned solely with the right, if any, of a § 2255 movant to argue his motion to vacate sentence pro se. *Juelich* determined that such a petitioner no longer possessed a sixth amendment pro se right, and hence applied the test for non-constitutional error. 342 F.2d at 31-32. Compare *United States v. Plattner*, *supra*, 330 F.2d [271] at 273, where the court observed:

> The right to act pro se . . . is a right arising out of the federal constitutional [sic] and not the mere product of legislation . . .. Thus we would be required to remand the case even if no prejudice to [defendant] were shown to have resulted from the refusal to permit him to act pro se.

There is, however, another sense of "prejudice" in this dictum from

> *Juelich* that illustrates a more appropriate use of the harmless error doctrine. The court noted that defendant was not prejudiced because he was permitted to question witnesses, argue his case, assign additional grounds for his § 2255 motion, and otherwise directly participate in the proceedings, despite his request to defend pro se having been denied. *United States v. Juelich*, 348 F.2d at 33. A defendant afforded a genuine opportunity to help conduct his defense may be in no way harmed by the denial of his formal motion to defend pro se.

If *Adams, supra* and *MacKenna* made it a constitutional violation to force counsel on a state criminal defendant, *Faretta* would not have been a landmark case. Additionally, *MacKenna* would be in direct conflict with *Adams*. The law of the land would have been decided in 1942 in *Adams* where the court states 317 U.S. at page 279, 63 S.Ct. at 242: "the Constitution does not force a lawyer upon a defendant." Yet that phrase for 33 years, until 1975, was never held to mean that forcing such counsel would be a constitutional violation. If *Adams* had so held, then the *MacKenna* court would have granted the writ. A *per se* constitutional violation would have taken place.

The Supreme Court in *Faretta* cites *Adams* at 422 U.S. page 814, 95 S.Ct. at

page 2531, and states that the:

> . . . case does not of course, necessarily resolve the issue before us. It held only that "the Constitution" does not force a lawyer upon a defendant . . whether the Constitution forbids a state from forcing a lawyer upon a defendant is a different question.

While *Chapman* says that the law in this circuit since *MacKenna* has been that a "court is not justified in imposing assigned counsel on the defendant against his will" it never accorded such a statement its rightful constitutional position until 1977. The *Chapman* court stated at page 890:

> Second, even had we not explicitly characterized the right to defend pro se as a sixth amendment right prior to *Faretta*, the constitutional basis of that right should be retroactively applied at least where the right was independently guaranteed by § 1654. To begin with, the fundamental place of § 1654 in our scheme of justice is illustrated by the history of that statute. The precursor of § 1654 was enacted by the First Congress as section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92. It was passed in the context of colonial tribunals composed largely of laymen. Section 35 was enacted by the Congress and signed by President Washington one day before the

sixth amendment was proposed.

Such a holding shows that the court violated the sacred rule of constitutional law that a court should never reach a constitutional issue when the case can be resolved on other grounds. *United States v. Rias*, 524 F.2d 118 (5th Cir. 1975); *Ashwander v. TVA*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). *Chapman* could have been decided under 28 U.S.C. § 1654, and there was no need for the court to reach any constitutional issues. *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

No one doubts that prior to *Faretta* the Fifth Circuit explicitly said that the right to defend *pro se* is guaranteed by the Fifth and Sixth Amendments. However, this is not the same thing as saying that the "forcing of any attorney" on a state criminal defendant violates the Constitution. Not until 1977, in *Chapman* which followed *Faretta* by two years, was this latter rule pronounced in this Circuit.

Faretta and *Chapman* do forge a new constitutional rule. Until these decisions, the cases had only directed state trial judges to allow criminal defendants, under certain circumstances, to knowingly, intelligently, freely, and voluntarily waive their right to the assistance of counsel. These prior cases did not say that the Constitution

requires all such defendants to be assisted by counsel. Now, subsequent to *Faretta* and *Chapman*, state trial judges know that forcing an attorney on one who has a constitutional right to absolute self-representation may violate that right.

The question here is not that of abandoning *stare decisis* and overruling a prior constitutional decision, *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815 (1932), but rather, that of a new interpretation of what an already founded constitutional right means. As in *Miranda v. Arizona*, 384 U.S. 436, 442, 86 S.Ct. 1602, 1611, 16 L.Ed.2d 694 (1966), the holding of *Faretta* and *Chapman* were not "innovation[s] in our jurisprudence, but [are] an application of principles long recognized and applied in other settings." Here, the principle was applied for the first time in 1975. (For a recent discussion of the difference between holdings and dicta as it relates to *stare decisis*, see *"Stare Decisis,"* 79 F.R.D. 509.)

[1] Upon this closer look, it becomes clear that prior to *Faretta*, it had not been specifically held that a defendant in a state court criminal trial had an absolute right to defend *pro se*. Petitioner's reliance on *MacKenna* and its progeny is misplaced.

While it may appear that this conclusion avoids the language of *Garcia*

and *Chapman* as they interpret *MacKenna*, neither case, nor any others in this circuit prior to *Faretta*, held that it is a constitutional violation to force counsel on a *pro se* state criminal defendant. This court only concludes that while the law in this circuit between *MacKenna* and *Faretta* was the right to *pro se* representation is rooted in the Fifth and Sixth Amendments, until *Faretta*, it was not decided that those same amendments meant that forcing an attorney would deprive a state criminal defendant of those constitutional protections.

Support for this distinction between the right of a criminal defendant to waive counsel and defend *pro se*, is found in those cases dealing with a defendant's right to waive a jury trial. In *Singer v. United States*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 620 (1965), on certiorari to the Supreme Court, Singer challenged the trial court's refusal to allow the waiver of a jury trial. Petitioner argued that a defendant in a federal criminal case has not only an unconditional constitutional right to a trial by jury, but also a correlative right to waive a jury and have his case decided by a judge alone. The petitioner's contention was based on the case of *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930) which held that in some instances a defendant can waive his right to a trial by jury. In rejecting the petitioner's argument, the court observed

that:

> The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. *Id.* 380 U.S. at 34-35, 85 S.Ct. at 790.

The court in *Faretta* recognized this axiom, saying that: "[T]he inference of rights is not, of course, a mechanical exercise." *Faretta, supra,* 422 U.S. at 819, 95 S.Ct. at 2533, footnote 15. Moreover, the court thereupon followed the reasoning of *Singer*, stating:

> We follow the approach of *Singer* here. Our concern is with an independent right of self-representation. *We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel.* . . . On the contrary, the right must be independently found in the structure and history of the constitutional text. *Id.* (emphasis added)

If, as it is concluded above, *MacKenna* and its progeny hold only that a criminal defendant has the constitutional right to waive the assistance of counsel, then, prior to *Faretta*, even in the Fifth Circuit, the question of whether a trial court could force counsel on a defendant without violating the defendant's constitutional rights was unanswered.

II. RETROACTIVITY OF FARETTA

The Petitioner's second contention is that the absolute rule of *Faretta v. California, supra,* should be applied retroactively. The Fifth Circuit has not ruled directly on this issue. In *Stepp v. Estelle,* 524 F.2d 447 (5th Cir. 1975), the principles laid down in *Faretta* regarding self-representation were reviewed. The case, however, is inapposite. There, the petitioner in a § 2254 action, sought relief from a state court conviction on the grounds that his waiver of counsel had not been knowing and intelligent. The district court's grant of the writ was reversed on the basis that the petitioner had been competent to defend *pro se* and, therefore, his waiver of counsel was valid. *Faretta* was raised only to determine whether the petitioner's self-representation was itself a violation of a constitutional right. The court's holding was in line with the requirements originally announced in *Johnson v. Zerbst,* 304 U.S. 458, 468, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) dealing with waiver of constitutional rights.

The case of *Chapman v. United States, supra,* is again not determinative. Although the language there would indicate that the Fifth Circuit is leaning toward retroactivity, such prouncements can only be viewed as *dict*[sic]. The court expressly stated that the question of retroactivity was not then an issue.

> First, the question of retroactivity of *Faretta* does not arise under the circumstances of this case. Alternatively, even were the retroactivity of that decision at issue, we would apply it retroactively to a defendant tried in *federal court*. (Emphasis added) *Id.* at 890.

[2] Therefore, without solid precedent in the Fifth Circuit to guide this decision, other jurisdictions and circuits may be consulted. The issue of retroactivity is governed generally by the criteria enunciated in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) where it was said:

> The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliances by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

The California Supreme Court in *People v. McDaniel*, 16 Cal.3d 156, 127 Cal. Rptr. 467, 545 P.2d 843 (Cal. 1976), *cert. denied*, 429 U.S. 847, 97 S.Ct. 131, 50 L.Ed.2d 119 (1976), a unanimous decision, after applying the *Stovall* criteria, held that *Faretta* should not be applied retroactively even to cases on direct appeal. The Eighth Circuit in

Martin v. Wyrick, 568 F.2d 583 (8th Cir. 1978), *cert. denied*, 435 U.S. 975, 98 S.Ct. 1623, 56 L.Ed.2d 69, approved of the California court's analysis in its decision to deny retroactive application in a case where the issue was squarely presented. The Eighth Circuit's reasoning is persuasive. First, the court found that the purpose of *Faretta* was not to enhance the reliability of the truth-determining or fact-finding process and, therefore, little or no weight is added to the balance in favor of retroactive application since litle [sic] or no prejudice in the trial itself is suffered by an accused whose guilt was determined without benefit of the new rule. Second, since the long-recognized practice was to place self-representation within the discretion of the court, justifiable reliance also favored non-retroactivity. Finally, recognizing that retroactive application could require new trials for a number of convicted persons, retroactive application of the rule would have an adverse effect on the administration of justice. This analysis holds true in the case at hand. In light of these decisions and the absence of direct authority in the Fifth Circuit, *Faretta* should not be applied in this case.

Consequently, Petitioner is incorrect on both of his contentions.

RECOMMENDATION

For the foregoing reasons, the Petition should be DENIED and this case dismissed.

James Robert SCOTT, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 76-1718.

District Court of Appeal of Florida,
Second District.

May 4, 1977.

The Lake County Circuit Court, John W. Booth, J., denied petition for post-conviction relief, and petitioner appealed. The District Court of Appeal, Grimes, J., held that the rule of *Faretta v. California*, which gives an accused the constitutional right to represent himself, will not be given retroactive application.

Affirmed.

1. Courts 100(1)

Rule of *Faretta v. California*, which gives an accused the constitutional right to represent himself, will not be given retroactive application, since all three criteria relevant to a determination of whether a newly adopted constitutional ruling is retroactive mitigated against retroactivity.

2. Courts 100(1)

Criteria to be used in determining whether a newly adopted constitutional ruling is retroactive are: (1) the purpose of the new standard; (2) the extent of reliance on the old standard, and (3) the effect upon the administration of justice of a retroactive application of the new standard.

3. Courts 100(1)

New constitutional rules have been held to be retroactive where the major purpose of the new doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises questions about the accuracy of guilty verdicts in past trials; on the other hand, retroactivity has been denied where the court has been unable to conclude that the newly proscribed practice of the past presents a substantial likelihood that the results of a number of those trials were factually incorrect.

Richard A. Belz, Florida Legal Services, Inc., Prison Project, Gainesville, for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee, and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

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Richard A. Belz, Florida Legal Services, Inc., Prison Project, Gainesville, for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee, and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

GRIMES, Judge.

[1] The issue presented by this case is whether the rule of *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which gives an accused the constitutional right to represent himself should be given retroactive application.

Appellant was charged with robbery and kidnapping. Prior to trial, he filed a pro se motion to dismiss his appointed public defender in order to defend himself. The motion was denied. Appellant was represented by the public defender during his trial at which he was convicted. He took a direct appeal in which the issue of the denial of self representation was specifically raised. This court affirmed the appellant's conviction by a decision without opinion in *Scott v. State*, 308 So.2d 213 (Fla. 2d DCA 1975).

Several months later, the United States Supreme Court held that a criminal defendant has a right to knowingly and intelligently decide to represent himself. *Faretta v. California, supra.* Appellant subsequently filed a motion for post-conviction relief in which he asserted the retroactivity of the *Faretta* decision. The court below ruled that *Faretta* is not retroactive. This is an appeal from the denial of that motion.

[2] The United States Supreme Court has set forth the criteria to be

used in determining whether a newly adopted constitutional ruling is retroactive. These criteria are: (1) the purpose of the new standard; (2) the extent of reliance upon the old standard; and (3) the effect upon the administration of justice of a retroactive application of the new standard. *Halliday v. United States*, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

The Purpose of the New Standard

[3] New rules have been held to be retroactive where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises questions about the accuracy of guilty verdicts in past trials. *Adams v. Illinois*, 405 U.S. 278, 92 S.Ct. 916, 31 L.ed.2d 202 (1972); *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971). Retroactivity has been denied where the court has been unable to conclude that the newly proscribed practice of the past presents a substantial likelihood that the results of a number of those trials were factually incorrect. *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971); *see Williams v. United States, supra.* Applying this criteria to *Faretta*, the decision should not be applied

retroactively.

The Supreme Court in *Faretta* tacitly acknowledged that ordinarily the rights of a criminal defendant will be better protected through the assistance of counsel when it said:

> "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. . . . For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. . . .
>
> * * * * * *
>
> "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. . . ."

Nevertheless, the court held that the defendant's free choice to defend himself must be honored.

Thus, in applying the first criterion, we agree with the Supreme Court of California in *People v. McDaniel*, 16 Cal.3d 156, 127 Cal.Rptr. 467, at 473, 545 P.2d 843 at 849 (1976), cert. denied, *McDaniel v. California*, 429 U.S. 847, 97 S.Ct. 131, 50 L.Ed.2d 119 (1976) when it declined to give *Faretta* retroactive effect and stated:

> ". . . the purpose of the rule is to secure to an accused the personal freedom to choose how and by whom he will defend against a criminal charge. It is manifest . . . that compliance with the rule is not intended by the majority of the court in *Faretta* to enhance the reliability of the truth-determining or fact-finding process, as the majority anticipate and indeed concede, that such compliance will most likely have the directly opposite effect."

The Extent of Reliance Upon the Old Standard

In considering the second criterion, we find that prior to *Faretta*, the rule in Florida was that an accused who was mentally competent and sui juris had the right to conduct his own defense in the absence of unusual circumstances. *Cappetta v. State*, 204 So.2d 913 (Fla. 4th DCA 1967), reversed on other grounds, *State v. Cappetta*, 216 So.2d 749 (Fla. 1968); *Hammond v. State*, 264 So.2d 463 (Fla. 1st DCA 1972). The unusual

circumstances included, but were not limited to:

> ". . . whether the accused by reason of age, mental derangement, lack of knowledge, or education, or inexperience in criminal procedures would be deprived of a fair trial if allowed to conduct his own defense, or in any case, where the complexity of the crime was such that in the interest of justice legal representation was necessary . . . ." *Cappetta v. State* at 918.

The determination of whether there were unusual circumstances rested in the sound discretion of the court and was not to be disturbed absent an abuse of that discretion. *Cappetta v. State, supra.*

In denying the request for self representation, the court acknowledged that the appellant was sui juris and mentally competent. The reasons given for the denial were that the appellant lacked the formal or practical education in the law necessary to conduct his own defense and that the case was one of great complexity which involved numbers of witnesses and tangible items of evidence far in excess of the norm. We upheld the discretion of the court in denying the appellant the right to represent himself when we affirmed the judgment in his direct appeal. Our affirmance in that case was in reliance upon the law of Florida as it existed at

that time.

The Effect Upon the Administration of Justice of a Retroactive Application of the New Standard

We cannot know for certain, but we assume that there are a sizeable number of persons in Florida who have been convicted following the denial of their requests to represent themselves. Should *Faretta* be applied retroactively, these persons would have to be retried. The retroactive application might also prompt the contention that unless a person was advised that he had the right to represent himself, it could not be said that he has knowingly and intelligently decided not to do so. Finally, since a retroactive application of *Faretta* would allow convicted persons without adequate legal training to be granted new trials in which they could defend themselves, it seems evident that the great majority of these cases would be concluded with the same result. Such acquittals as might obtain would more logically be attributable to the absence or failing memory of witnesses rather than the legal skills of the individual defendants.

Since all three criteria mitigate against it, we hold that *Faretta* should not be applied retroactively in this state. *Accord, People v. McDaniel, supra; Houston v. Nelson,* 404 F.Supp. 1108 (C.D.Cal. 1975); *contra, People v.*

Holcomb, 395 Mich. 326, 235 N.W.2d 343 (1975).

AFFIRMED.

BOARDMAN, C.J., and McNULTY, J., concur.

James Robert SCOTT, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 74-438.

District Court of Appeal of Florida,
Second District.

Feb. 12, 1975.

Appeal from Circuit Court, Lake County; W. Troy Hall, Jr., Judge.

PER CURIAM.

Affirmed.